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In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 52

EDWARD P. AVENT, JR., PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

I

STATEMENT

Edward P. Avent, Jr., pleaded guilty to five out of nine counts which charged him with knowingly misbilling and misconsigning cars containing coal for Class 2 purposes and, after thus deceiving the carriers and receiving delivery and possession thereof, converting them to Class 5 purposes, for which he was fined $2,000 and costs. The only question raised is that the all-important emergency service order provisions of the Transportation Act of 1920 are unconstitutional.

The first count charged that Service Order No. 23 was promulgated on July 25, 1922, because the Commission was of opinion that an emergency requiring immediate action then existed upon the lines of the railroads operating east of the Mississippi River. The carriers were directed to give preference and priority to the movement of food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil; that in the supply of cars to coal mines carriers were directed to place, furnish, and assign cars to mines suitable for loading and transportation of coal in succession as might be required for the following classes of purposes and in the following order of classes, viz: Class 1, such special purposes as may be specially designated by the Commission. Class 2, fuel for (a) railroads, ships, and vessels; (b) public utilities, including street and interurban railways, electric power and light, gas, water and sewers; (c) United States, State and municipal governments, hospitals, schools, and other public institutions. Class 3, bituminous coal consigned to any Lake Erie ports for transshipment by water to ports upon Lake Superior. Class 4, commercial sizes of coal for domestic use. Class 5, other purposes.

Order No. 23 further provided that no coal embraced in Classes 1, 2, 3, or 4 shall be subject to reconsignment or diversion except for some purpose in the same class or in a superior class in the order of priority prescribed.

The count further charged that there was a shortage of serviceable locomotives and cars and a congestion of traffic due to the coal miners' strike and the railroad shopmen's strike; that Louisville & Nashville Railroad Company was a coal-loading carrier which was concurrently unable promptly to transport all freight offered to it for movement; it was then able to furnish and place to coal mines upon its lines cars suitable for the loading and transportation of coal required for Class 1 and Class 2 purposes, but not for Class 3, Class 4, or Class 5 (Tr. 2).

Avent was a member of the copartnership named Bewley-Darst Coal Company, which was engaged in the buying, selling, and shipping in interstate commerce of bituminous coal. From July 26 to September 20, 1922, Louisville & Nashville, C., C., C. & St. L., Cincinnati Northern, and Michigan Central transported bituminous coal from Shields, Coburn, and Merna, Kentucky, to Union City, Michigan, over their respective connecting lines. Peerless Portland Cement Company was engaged in the manufacture of cement at Union City. From July 26, 1922, to August 29, 1922, plants for the manufacture of cement were in Class 5, and from August 30, 1922, to September 20, 1922, such plants were in Class 3. Berger Coal Mining Company operated a mine at Shields, Ky., on the line of the Louisville & Nashville, and requested that carrier to furnish and place at the Shields mine 11 empty cars suitable for loading and transportation of coal for Class 2 purposes, which the carrier did (Tr. 3). Louisville & Nashville

car 76469 was loaded by Berger Coal Mining Company on August 14, 1922, with 103,400 pounds of bituminous coal; on August 16, 1922, that company sold the coal to the copartnership of Bewley-Darst Coal Company, of which Edward P. Avent, Jr., was a member; whereupon, on August 16, 1922, Avent delivered to the Louisville & Nashville at the Shields mine, for transportation to Union City, Mich., that identical car of coal, which was transported by the several carriers through Cincinnati to Union City, Mich., where, on September 5, 1922, delivery was made to Peerless Portland Cement Company on instructions given by that company to the agent of the Michigan Central. The Peerless Company used the coal for the purpose of manufacturing cement (Tr. 3).

The count further charged that Avent unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation of the carload of coal; that an advantage was given to him and a discrimination practiced in his favor in this way: Intending to deceive the carriers into believing that the coal was intended for Class 2 purposes, and thereby to cause the carriers to transport the coal which was used for the purpose of manufacturing Portland cement, in delivering the car to the Louisville & Nashville at Shields, he billed and consigned the car to "Union City Gas Company," at Union City, Mich., when he knew there was no such person, firm, or corporation doing business under that name in existence at Union City; when he knew the coal was not intended for use by any gas company or for any

other use embraced in Class 2, but that it was intended for the Peerless Portland Cement Company engaged in the manufacture of cement, which use was embraced in Class 5. Without that deception in the billing Avent would not have secured the cars in transportation (Tr. 4).

With the exceptions of certain dates, points of origin, and other minor details, the charges in the remaining counts are the same as those in the first count. It appears that all of the cars were billed and consigned to the fictitious "Union City Gas Company" at Union City, Mich., with the Peerless Portland Cement Company as the intended ultimate consignee and consumer. By the deception of Avent that company received and consumed coal for Class 5 purposes and the carriers were furnishing cars for transportation for coal for Class 2 purposes.

Counsel for the Government conceded that counts 1, 2, and 3 referred to 3 carloads which were part and parcel of the same transaction, and counts 9 and 10 were part of another transaction. The court found there were but 2 offenses and imposed sentence accordingly (Tr. 22).

With a memorandum opinion District Judge Peck overruled the demurrer to the indictment (Tr. 21, 22). Motion in arrest of judgment (Tr. 23) was overruled (Tr. 24) and the writ of error was then sued out.

II

ASSIGNMENT OF ERRORS

In substance the principal errors relied upon are (1) the facts do not constitute an offense; (2) Avent should not have been held liable for failure to obey Service Order No. 23 because that order is in violation of the Tenth Amendment; (3) the Service Order is in violation of the Fifth Amendment; (4) the Service Order is void because it grants a preference to the ports of one State over those of another; (5) that paragraph (15) of Section 1 of the Interstate Commerce Act, as amended by Section 402 of the Transportation Act, is in violation of Article I, section 1, of the Constitution and also of the Tenth Amendment.

III

HISTORY OF THE TIMES

In *Stafford* v. *Wallace*, 258 U. S. 495, 513, this Court, speaking by Mr. Chief Justice Taft, said:

> It was for Congress to decide from its general information and from such special evidence as was brought before it the nature of the evils actually present or threatening and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted (*Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Danciger* v. *Cooley*, 248 U. S. 319, 322.

After America entered the World War the conflict developed into a war of transportation as well as a war of arms. Transportation facilities on both land and sea were inadequate while their need was paramount to bring the war to a close. Principally for lack of revenue to provide new equipment and to increase wages the rail carriers had become unequal to a great national emergency. Congestion prevailed at all terminals. Rail carriers were confiscating such fuel as appeared on their tracks for use in their locomotives. Many of the great industries were threatened with shutdown for lack of fuel. The progress of shipbuilding was imperiled. Prolonged strikes on the part of the railroad and coal-mine employees with the awful consequences were threatened and imminent. Whole communities were without fuel, and the winter of 1917–1918 was the severest in a generation.

Circumstances such as these prevailed when the President issued the Proclamation, on December 26, 1916, to take possession and assume control, for the national security and defense, of the entire railway transportation system, which was then in a deplorable condition. Everywhere was shortage of cars, equipment, and material. At one time the Director General ordered 100,000 cars and 2,000 locomotives. Railroads were consolidated, terminals were shared in common, equipment was standardized, and finally, at infinite cost, the transportation system of the country became almost as important an auxiliary in the World War as the British fleet.

Transportation Act of 1920 provided for the relinquishment of the railroads from Federal Control. The amendments to the Interstate Commerce Act provided by the Transportation Act were enacted in the light of conditions which Federal Control undertook to alleviate and for the future promotion of "the transportation needs of the country."

Federal control terminated March 1, 1920 at 12.01 a. m. Commencing May 20, 1920, and from thence hitherto the Interstate Commerce Commission issued as many as 40 service orders. For a digest, together with the service order number and effective and cancellation dates of each, see Appendix A.

At the end of July, 1922, when Service Order No. 23 was promulgated, the strike of the mine workers in the anthracite and bituminous coal fields was at its height. There was an acute coal shortage due to a practically complete suspension of mining operations since April 1, 1922. On July 1, 1922, approximately 400,000 members of the Federated Shop Crafts employed by the railway companies operating throughout the continental United States went on strike. Rolling stock rapidly deteriorated. Freight and passenger trains to an aggregate of several hundred were discontinued and abandoned. Transportation of passengers and property and the carriage and handling of the mail was obstructed and retarded. There was grave danger that the entire transportation system would become so impaired as to be useless or utterly inadequate, and the entire Nation would become engulfed in a national disaster and the

people thereof would be utterly unprovided with food and fuel in the face of winter. *United States* v. *Railway Employees*, 283 Fed. Rep. 479; 286 Fed. Rep. 228; 290 Fed. Rep. 978.

Circumstances such as these prevailed when Service Order No. 23 was issued. For the full contents and purport of that order see, Appendix B.

IV

THE STATUTE

Section 402 of the Transportation Act provides that the paragraphs added to section 1 of the Interstate Commerce Act by the act approved May 29, 1917 (40 Stat. 101), shall be amended as follows (41 Stat. 476, 477, Ch. 91):

> (10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment and the supply of trains, by any carrier by railroad subject to this Act.
>
> (11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.
>
> (12) It shall also be the duty of every carrier by railroad to make just and reasonable

distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

(14) The Commission may, after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this

Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it and the penalties or other sanctions for non-observance of such rules, regulations, or practices.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a rea-

sonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

V

ARGUMENT

A. THE PLEA OF GUILTY NARROWS THE QUESTION HERE TO ONE OF CONSTITUTIONAL LAW

The plea of guilty is a full confession "of the evil intent imputed to the defendant." That he was practicing deception and fraud on Louisville & Nashville and other railroad companies in misbilling and misconsigning the coal, in violation of the service order, is not open to question. That he thereby made himself a preferred shipper to his advantage and unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation of coal must likewise be conceded.

A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement. Obviously such a plea would not cure jurisdictional defects. Moreover, if the facts charged in the indictment are so obviously inadequate as not to sustain an offense against the United States, a plea of guilty would not make such inadequate charges an offense. See *Tucker* v. *United States*, 196 Fed. Rep. 260; *Hocking Valley Railway* v. *United States*, 210 Fed. Rep. 735, 738.

In *Commonwealth* v. *Hinds*, 101 Mass. 209, 210, the true rule is thus clearly stated by Mr. Justice Ames:

> The plea of guilty is, of course, a confession of all the facts charged in the indictment, and

also of the evil intent imputed to the defendant. It is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion. But if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged.

B. WHETHER CONGRESS HAD THE POWER TO ENACT THE LEGISLATION AND THE COMMISSION HAD THE POWER THEREUNDER TO ISSUE SERVICE ORDER NO. 23 HAS ALREADY BEEN SETTLED BY RECENT ADJUDICATIONS OF THE COURTS

By his plea of guilty Avent admitted that he knew of the promulgation of Service Order No. 23 and of its full contents. For it was because of its terms which he wished to evade that he misbilled and misconsigned the coal.

The argument that the order was not binding on him because it was directed to the carriers and its terms were not published may not prevail. Paragraph (15) specifically provides that the Commission shall have authority to issue the order "with or without notice, hearing, or the making or the filing of a report, according as the Commission may determine" (41 Stat. 476, Ch. 91). The carriers obviously were undertaking to carry out the terms of the order. Avent builds on a weak foundation when he undertakes to escape the consequences of his deception by arguing that the service order which he knowingly violated was not published and filed in the same manner and form as schedules of rates.

The Transportation Act of 1920 stands before the Court with all of the presumptions of validity (*Nicol* v. *Ames*, 173 U. S. 509, 512). Moreover, many of the important provisions of that act when read in connection with the whole act have already been sustained. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad*, 257 U. S. 563; *Pennsylvania Railroad* v. *Railroad Labor Board*, 261 U. S. 72; *New England Divisions Case*, 261 U. S. 184; *The Recapture Clause Case*, 263 U. S. 456. In each instance this Court affirmed the decree of the court from which the appeal was taken. The power of the judiciary has, therefore, been repeatedly thrown behind the Transportation Act and the great questions of public policy which it was designed to subserve in order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477, Ch. 91) and "in order to provide the people of the United States with adequate transportation" (41 Stat. 488).

If the Adamson Act prescribing the eight-hour day for train employees to avert a strike was a valid exercise of Congressional power under the Commerce Clause, *Wilson* v. *New*, 243 U. S. 332, *a fortiori*, paragraph (15), which was designed to avert disaster on account of shortage of food and fuel such as prevailed during the coal miners' strike and the railway shopmen's strike on the eve of winter, is likewise within the bounds of Congressional propriety. If Congress may enact emergency laws to prevent strikes, it would hardly be denied the power to enact

1 253 U.S. 206

similar laws to alleviate disasters which directly resulted from such strikes.

The order did not prohibit commerce. The prohibition against commerce existed prior to the date the order was promulgated and it arose from disability of the carrier ascribable to insufficiency of serviceable locomotives and cars and to congestion of traffic. The order recognized those conditions which effected the prohibition, and then proceeded to lay down reasonable rules and regulations for such transportation service as such common carriers by railroad were able to render under their existing condition of inability to serve all shippers. The order does not differ materially from embargoes, the lawfulness of which has been recognized repeatedly by the Courts and the Interstate Commerce Commission. See *Baltimore Chamber of Commerce* v. *B. & O. R. R.*, 45 I. C. C. 40; *U. S.* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 348; and *Gen. Inv. Co.* v. *L. S. & M. S. Ry.*, 226 Fed. 976, 978.

In *Penn. R. R.* v. *Puritan Coal Company*, 237 U. S. 121, 133, this Court, speaking through Mr. Justice Lamar, said:

> Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been

> expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that "if his coach be full" he was not liable for failing to transport more than he could carry. *Hutchinson on Carriers*, 146; *Lovett* v. *Hobbs*, 2 Shower 127; *Riley* v. *Horne*, 2 Bing. 217; *Peet* v. *Ry.*, 20 Wisconsin, 594. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers, but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands they are bound to treat shippers fairly, if not identically. *In determining how the inadequate supply shall be distributed it might be necessary to consider the character of the freight tendered—whether perishable or staple and whether a necessity of life needed in crowded cities and the like.* In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars, and the company's own coal cars. *In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission.* [Italics ours.]

In recent times it has been the practice of the carriers to give shippers advance notice (called embargoes or embargo notices) when their "coach was full," or, in other words, when they were unable to serve all because of a car shortage or of insufficient equipment

or of traffic congestion. The Commission's order is such an advance notice with the further requirement that the carriers, when under the disability referred to should give preference and priority in the transportation of necessities of life. Embargoes were repeatedly laid by the Government during Federal control (*U. S.* v. *Metropolitan Lumber Co., supra*).

Thus the courts have expressly approved the view that in times of car shortage, etc., common carriers might lawfully be required to give preference and priority in the transportation of necessities of life, such as food and fuel, which is the substance of the Commission's Service Order No. 23.

In *Lambert Run Coal Co.* v. *Baltimore & Ohio*, 258 U. S. 377, the judgment of the United States Circuit Court of Appeals was reversed because the District Court had no jurisdiction to hear and determine the controversy. The Circuit Court of Appeals had also expressed its opinion that the District Court was without jurisdiction, nevertheless that Court sustained this emergency power very vigorously, and in so doing Circuit Judge Woods said (267 Fed. Rep. 780, 781):

> The Congress has not, however, conferred on coal mines equality among themselves—the right of each mine in time of coal car shortage to be furnished cars in proportion to mine ratings, without regard to the public welfare and safety. Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation, and unex-

pected needs of the public which can not be anticipated and justly provided for by inelastic legislative enactment. It would be strange, indeed, if the Congress had guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

* * * * *

The commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the commission was unwisely or improvidently exercised. *Interstate Comm. Commn.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; 27 Sup. Ct. 350; 51 L. Ed. 553; 9 Ann. Cas. 1075.

The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress in conferring the right could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff, claiming the benefits of the statute, can not assert the unconstitutionality of its limitations. *Daniels*

v. *Tearney*, 102 U. S. 415; 26 L. Ed. 187; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17; 24 Sup. Ct. 310; 48 L. Ed. 598. For these reasons the motion to dismiss the bill should have been granted.

In *Peoria & Pekin Union* v. *United States*, 263 U. S. 528, this Court annulled the switching order of the Commission which compelled performance of the primary duty to receive and transport cars of a connecting carrier, on the ground that switching was not embraced within the emergency paragraphs. The carrier in that case made no pretense that the statute was invalid and the Court said, "It is also conceded that the existing conditions were such as to justify entry of the order under the emergency powers, if these include the requiring of switching, * * *. The substantive question presented is one of statutory construction—*the scope of the emergency power*" (263 U. S. 532).

After assembling and reviewing the references to the progress in the Congress toward the enactment of the provisions and to certain of the discussions of Chairman Esch, the court reversed the opinion and judgment of the District Court and inferentially at least held these emergency provisions valid.

The persistent exercise of this power by the Commission, practically without complaint on the part of the carriers, leaves little room for Avent to challenge its validity on a plea of guilty to the charges in the indictment. His practice of misbilling and

misconsigning coal to industries engaged in the manufacture of cement during times of coal and car shortage does not put him in a favorable position to challenge an order entered by the Commission which was accepted and executed by the carriers to prevent public calamity.

The case of *Hammer* v. *Dagenhart*, 247 U. S. 251, is not apposite, but the opinions of this Court in *Int. Com. Com.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 474; *Penn. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121, 133; and *Wilson* v. *New*, 243 U. S. 332, are controlling here and support the validity of the Commission's order.

In *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 471, 472, this Court said:

> Congress thus having plenary power subject to the limitations imposed by the Constitution to prescribe the rule by which commerce among the several States is to be governed, the question necessarily arises, what are the principles that should control the judiciary when determining whether a particular act of Congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the Constitution?
>
> The general principle applicable to this subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch* v. *Maryland*,

> 4 Wheat. 316, 421, 423, it was said: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power."

As further indication of the national necessity the Court's attention is directed to the act entitled "An Act to declare a National Emergency to exist in the Production, Transportation, and Distribution of coal and other fuel," approved September 22, 1922 (42 Stat. 1025, Ch. 413), in which Congress further exercised a very extensive regulatory power in such emergencies as existed at the time Service Order No. 23 was promulgated. Nor does any case involving the construction or validity of that act appear ever to have been commenced in the courts so universal

was its acceptance by both carriers and the shipping public.

C. THE ORDER OF THE COMMISSION DOES NOT GIVE PREFERENCE TO ONE PORT OVER ANOTHER

In a voluminous brief with numerous exhibits opposing counsel has all but abandoned that point, as he gives to it but a single page.

The constitutional provision is "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." See, *Alaska* v. *Troy*, 258 U. S. 101.

Service Order No. 23 merely directs that a supply of coal should move in the ordinary channels from the mines to the lake ports, thence to Duluth and the Northwest. This was the ordinary normal route for such transportation and had been from time immemorial. The language of the order is "for bituminous coal consigned to *any* Lake Erie port for transshipment by water to *ports* upon Lake Superior." How this could be a preference of any one port over another it is difficult to conceive. It can not be believed that opposing counsel is making an argument in behalf of Pacific ports, or Atlantic ports, or ports on the Gulf of Mexico. Moreover, as the learned District Judge pointed out in his opinion, as the misbilled and misconsigned traffic moved from points in Kentucky to Union City, Mich., which was not embraced in that part of the order which deals with traffic to lake ports, Avent was in no position to assail that part of the order. If the Commission had

not entered the order in the form which it did it would have retarded and obstructed the movement of coal rather than facilitated the same. The Court takes judicial notice that the natural and normal route for coal from Kentucky, Pennsylvania, and West Virginia is to Lake Erie ports by rail, thence to Lake Superior ports by water, thence to destinations by rail. The Commission was dealing with the routing of traffic in normal channels and not with the selection and preference of ports.

D. CONGRESS HAD THE POWER TO AUTHORIZE THE COMMISSION WHEN AN EMERGENCY EXISTED TO ENTER SUCH AN ORDER AS SERVICE ORDER NO. 23 AND ITS AUTHORITY IN THAT BEHALF IS NOT A DELEGATION OF CONGRESSIONAL POWER

The indictment alleges certain offenses, namely, that Avent accepted and received certain concessions and discriminations from common carriers. The offenses charged in the indictment are fully outlined in the Elkins Act (32 Stat. 847, 34 Stat. 584), approved February 19, 1903, a statute which had been in force for 19 years and which was not enacted during the recent war period or the period subsequent thereto, and which has received approval of the courts in numerous, including the following, Court decisions: *Armour Packing Company* v. *United States*, 209 U. S. 56; *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Louisville & Nashville* v. *Mottley*, 219 U. S. 467; *Hocking Valley Ry.* v. *United States*, 210 Fed. 735, 234 U. S. 757; *Vandalia Ry.* v. *United States*, 226

Fed. 713, 239 U. S. 642; *Northern Central Railway* v. *United States*, 241 Fed. 25, 245 U. S. 645; *United States* v. *Union Stockyard Co.*, 226 U. S. 286; *United States* v. *M. R. T. Co.*, 145 Fed. 1007; *Chicago, St. Paul, Milwaukee & Omaha Ry.* v. *United States*, 162 Fed. 835. This indictment should be considered in the light of these cases.

The offenses, as alleged, are completely defined in the Elkins Act. Attention is directed to *C. & A. R. R. Co.* v. *Kirby*, 225 U. S. 155, and more especially to the view expressed at pages 164–166 in support of the view that the granting by a common carrier to a shipper of unauthorized expedition in the transportation of property is condemned by the provisions of the Elkins Act.

In *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, 474, this Court speaking through Mr. Justice White, said:

> That assumption is this, that commerce in the constitutional sense only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on, a doctrine the unsoundness of which has been apparent ever since the decision in *Gibbons* v. *Ogden*, 9 Wheat. 1, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such

> cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one.

In *United States* v. *Grimaud*, 220 U. S. 506, 517, this Court said:

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

The following decisions deal with questions arising in criminal prosecutions for violations of Federal statutes, the details of which were "filled up" by departmental regulations: *United States* v. *Grimaud*, 220 U. S. 506; *Dastervigness* v. *United States*, 122 Fed. 30; *Shannon* v. *United States*, 160 Fed. 870; *United States* v. *Deguirro*, 152 Fed. 568; and *United States* v. *Rizzinelli*, 182 Fed. 675.

The statutes under consideration represent a development of regulatory legislation throughout

a period of 35 years beginning in the year 1887. When defects in those statutes were pointed out in court decisions the infirmities were eliminated by amendment or enlargement of the statutes. The decision by this Court in *Penn. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121, 131, 132, clearly is to the effect that a violation of a rule of car distribution, which results in the granting of a concession or discrimination to a shipper, presents a matter of which the courts may take cognizance. It is apparent that the conduct of defendant, in procuring transportation and the use of cars through misrepresentations that deceived the carriers when competing shippers of coal were denied such transportation and use of equipment, was grossly discriminatory and prejudicial to the business of those competitors. It is this point, not the sale of coal, that is in the case at bar.

VI

CONCLUSION

The judgment of the District Court should be affirmed.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER, 1924.

APPENDIX A

Service Orders

Service Order No.	Date effective	Subject	Cancellation effective
	1920		
1	May 20	Rerouting freight to expedite movement regardless of routing instructions. Rates applicable, however, are rates in effect at date of shipment over route designated.	Dec. 21, 1920.
2	May 20	Relocation of some 30,000 coal cars from western roads to eastern roads.	Automatically.
3	May 20	Relocation of some 20,000 empty box cars from eastern to western roads.	June 24, 1920.
4	May 28	Texas carriers directed to unload 27,000 cars of grain.....	Automatically.
5	June 13	Preference and priority for pooled over nonpooled coal to Lake Erie ports for transshipment by water, en route to the Northwest.	Apr. 12, 1921.
6	June 24	Tidewater coal to New England—rescinded by Service Order No. 11.	Aug. 1, 1920.
7	June 21	Carriers east of Mississippi River directed to furnish preferentially coal mines with open top cars, amended by Service Order No. 9 and superseded by Service Orders 15 and 16.	July 13, 1920.
8	July 1	Coal for Philadelphia Electric Co.....	July 15, 1920.
9	July 21	Amendment to Service Order No. 7 requires "coal cars" shall not include flat gondola cars with sides less than 38 inches. Superseded by Service Orders 15 and 16.	Sept. 18, 1920.
10	July 26	Preference and priority in supply of cars for and in transportation of bituminous coal for Northwest.	Apr. 12, 1921.
11	Aug. 2	Tidewater coal to New England. This order indefinitely suspended by amendment September 17, 1920, the New England situation apparently having been measurably relieved.	Apr. 12, 1921.
12	Aug. 10	Orders discontinuance Service Order No. 9 for 90 days. Superseded by Service Orders 15 and 16.	Sept. 18, 1920.
13	Aug. 24	Carriers at Galveston, Tex., authorized to remove and store grain held in cars to release equipment.	Dec. 31, 1920.
14	Aug. 25	Supply and distribution of open-top cars to wagon mines. Rescinded by Service Order No. 17.	Sept. 18, 1920.
15	Sept. 19	Carriers east of Mississippi River to furnish mines with open-top cars suitable for loading and transporting coal in preference to any other use, provided that such "coal cars" (which shall not include or embrace flat-bottom gondola cars with sides less than 38 inches in height, inside measurement, or cars equipped with racks, or cars which on June 20, 1920, had been definitely retired from the coal service) may be used for freight moving in direction of mines upon a road not materially out of line and to points not beyond such mines. Also that noncoal-loading carriers within such territory shall deliver daily to connecting coal-loading carriers empty or loaded coal cars to their maximum ability. (S. O. 15 and 16, superseding Nos. 7, 9, and 12.)	Oct. 14, 1920.

SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1920		
16	Sept. 19	All carriers east of Mississippi River authorized to furnish cars to mines for transporting coal, in addition and without regard to existing ratings and distributive shares, upon written application showing that such coal is needed solely for current use of public utilities, water and sewer works, schools, hospitals, State or municipal governments, etc. (S. O. 15 and 16, superseding Nos. 7, 9, and 12.)	Oct. 14, 1920.
17	Sept. 19	Supply and distribution of open top cars to wagon mines; ordinarily cars not to be furnished to wagon mines which customarily do not load open top cars within 24 hours of placement.	Mar. 6, 1921.
18	Oct. 1	Private cars and cars placed for railroad fuel loading to be designated as "assigned cars." All others "unassigned" cars.	Mar. 24, 1921.
19	Oct. 1	Preference and priority in transportation of coal commandeered by Navy.	
20	Oct. 15	Supersedes Service Order No. 15. Extends territory outlined in that order to eastern boundary of States of Montana, Wyoming, Colorado, and New Mexico.	Nov. 29, 1920.
21	Oct. 15	Supersedes Service Order No. 16. Carriers east of Montana, Wyoming, Colorado, and New Mexico are authorized and directed to place, furnish, and assign cars to coal mines so that public utilities in that territory shall not suffer for lack of fuel.	Nov. 24, 1920.
	1922		
22	July 26	Routing freight to expedite movement without regard to routing instructions. Rates applicable, however, are rates in effect at date of shipment over route designated.	Apr. 22, 1923.
23	July 26	Carriers east of Mississippi River directed to give priority in movement to food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil; empty cars intended for transporting foregoing commodities; open-top cars (with sides less than 36 inches high) suitable for loading and transporting coal; that noncoal-loading carriers shall deliver daily to connecting coal-loading carriers empty coal cars to their maximum ability; that coal cars shall be used exclusively in coal trade so long as any coal mine remains to be served; that coal cars must be released within 24 hours after placement; that cars be placed for loading coal according to specific classes. Superseded by Service Order No. 25.	Sept. 20, 1922.
24	Sept. 1	Carriers west of Mississippi River directed to give priority in movement to food for human consumption, feed for livestock, livestock, perishable products, fuel, etc., and empty cars intended for transporting foregoing commodities.	Dec. 11, 1922.
25	Sept. 20	Supersedes Service Order No. 23. This order designates as coal-carrying cars, cars with sides 42 inches in height; permits the use under certain conditions of open-top cars for the movement of specified commodities, and eliminates the special classes of industries enumerated in Service Order No. 23 to receive coal.	Dec. 11, 1922.

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SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1922		
26	Nov. 22	Coal for Commonwealth of Virginia	Dec. 6, 1922.
27	Nov. 28	250 cars ordered placed at Elkhorn Piney Coal Manufacturing Co., at rate of 30 cars per day, account of threatened destruction of stock pile by fire.	
28	Dec. 1	Coal for Commonwealth of Virginia, 4 cars per day for 10 consecutive working days.	
29	Dec. 2	Missouri Pacific R. R. directed to place 40 cars per day for 10 consecutive days at mines in the so-called Spadra district; also 10 cars per day for 5 consecutive days, to the Bernice Mines.	
30	Dec. 12	Car supply for Shreve Run mine of James M. McIntyre & Co., 10 cars daily for 10 consecutive working days; and Kearney-Barnett mines of Jos. E. Thropp, 4 cars daily for 15 consecutive working days, to be consigned to U. S. Army.	
31	Dec. 20	Car supply for Commercial Coal Mining Co., at Twin Rocks, Pa., 3 cars daily for 15 consecutive working days, to be consigned to Government Fuel Yards, Washington.	
32	Dec. 30	Car supply for certain mines on Chesapeake & Ohio Ry. and Pennsylvania R. R. for coal consigned to Government Fuel Yards, Washington.	
	1923		
33	Jan. 6	Car supply at certain mines on West Virginia Northern, Indian Creek Valley, and Baltimore & Ohio R. R. for coal consigned to supply officer of U. S. Navy, shipments to be at rate of 5 cars daily for 27 consecutive working days.	
34	Jan. 6	Car supply at Latrobe, Pa., mines for coal consigned to U. S. Army Quartermaster, shipments to be 8 cars daily for 15 consecutive working days.	
35	Jan. 15	Car supply at certain mines on Norfolk & Western for coal consigned to U. S. Navy Yard, Portsmouth, Va., shipments to be 8 cars daily for 10 consecutive working days.	
36	Jan. 15	Car supply at certain mines on Pennsylvania R. R., Johnstown & Stony Creek R. R., for coal consigned to Government Fuel Yards, Washington, for 10 consecutive working days.	
37	Jan. 18	Controversy between Minneapolis & St. Louis R. R. and Peoria & Pekin Union Ry. over terms under which Peoria & Pekin shall interchange freight traffic between M. & St. L. and connecting carriers at and in vicinity of Peoria, Ill.	July 12, 1924.
38	Feb. 9	Car supply for Montevallo Mining Co., Aldrich, Ala., for coal for domestic purposes.	Feb. 26, 1923.
39	Mar. 5	Docking vessel "Maumee" at New Haven, Conn., so coal may be promptly forwarded to Springfield Gas Light Co., Springfield, Mass.	
	1924		
40	Apr. 1	Kansas City Terminal Ry. Co. required to permit Missouri-Kansas-Texas R. R. Co. to use Union passenger station and other terminal facilities at Kansas City, Mo.	

APPENDIX B

SERVICE ORDER NO. 23

At a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 25th day of July, A. D. 1922.

It appearing, in the opinion of the Commission that an emergency which requires immediate action exists upon the lines of each and all the common carriers by railroad subject to the Interstate Commerce Act, east of the Mississippi River, including the west bank crossings thereof, and because of the inability of said common carriers properly and completely to serve the public in the transportation of essential commodities. *It is ordered and directed:*

1. That each such common carrier by railroad, to the extent that it is currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway shall give preference and priority to the movement of each of the following commodities: food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil.

2. That to the extent any such common carrier by railroad is unable under the existing interchange and car service rules to return cars to its connections promptly, it shall give preference and priority in the movement, exchange, interchange, and return of empty cars intended to be used for the transportation of the commodities specially designated in paragraph numbered 1 hereof.

3. That any and all such common carriers by railroad which serve coal mines whether located upon

the line or lines of any such railroad or customarily dependent upon it for car supply, herein termed coal-loading carriers, be, and they are hereby, authorized and directed whenever unable to supply all uses in full, to furnish such coal mines with open-top cars suitable for the loading and transportation of coal, in preference to any other use, supply, movement, distribution, exchange, interchange, or return of such cars; *provided*, that the phrase "suitable for the loading and transportation of coal" as used in this order shall not include or embrace flat (fixed) bottom gondola cars with sides less than 36 inches in height, inside measurement, or cars equipped with racks, or cars which, on July 1, 1922, had been definitely retired from service for the transportation of coal and stenciled or tagged for other service.

4. That all such common carriers by railroad other than coal-loading carriers, herein termed noncoal-loading carriers be, and they are hereby, authorized and directed to deliver daily to a connecting coal-loading carrier or carriers, or to an intermediate noncoal-loading carrier for delivery through the usual channels to a coal-loading carrier or carriers, empty coal cars up to the maximum ability of each such noncoal-loading carrier to make such deliveries and of each such connecting coal-loading carrier to receive and use the coal cars so delivered for the preferential purposes herein set forth.

5. That all such common carriers by railroad be, and they are hereby, authorized and directed to discontinue the use of cars suitable for the loading and transportation of coal, for the transportation of commodities other than coal, so long as any coal mine remains to be served by it with such cars; and as to each noncoal-loading carrier, so long as deliveries

of any such cars to connecting carriers may be due or remain to be performed under the terms of this order.

6. That all such common carriers by railroad be, and they are hereby, authorized and directed, to place an embargo against the receipt of coal or other freight transported in open-top cars suitable for coal loading, by any consignee, and against the placement of such open-top cars for consignment to any consignee, who shall fail or refuse to unload such coal or other freight so transported in coal cars and placed for unloading, within 24 hours after such placement, until all coal or other freight so transported in coal cars and so placed has been unloaded by such consignee and shall notify the Commission of such action. This authorization and direction as to embargoes shall not interfere with the movement of coal to tidewater or the Great Lakes for transshipment by water, nor shall it apply where the failure of the consignee to unload is due directly to errors or disabilities of the railroad in delivering cars.

7. That in the supply of cars to mines upon the lines of any coal-loading carrier such carrier is hereby authorized and directed to place, furnish, and assign such coal mines with cars suitable for the loading and transportation of coal in succession as may be required for the following classes of purposes, and in following order of classes, namely:

Class 1. For such special purposes as may from time to time be specially designated by the Commission or its agent therefor. And subject thereto:

Class 2. (a) For fuel for railroads and other common carriers and for bunkering ships and vessels; (b) for public utilities which directly serve the general public under a franchise therefor, with street

and interurban railways, electric, power and light, gas, water, and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human food stuffs; hospitals; (c) for the United States, state, county, or municipal governments, and for their hospitals, schools, and for their other public institutions—all to the end that such common carriers, public utilities, quasi-public utilities, and governments may be kept supplied with coal for current use for such purposes, but not for storage, exchange, or sale. And subject thereto:

Class 3. (As to each coal-loading carrier which reaches mines in Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee and Alabama.) For bituminous coal consigned to any Lake Erie port for transshipment by water to ports upon Lake Superior. And subject thereto:

Class 4. (As to all such common carriers by railroad.) Commercial sizes of coal for domestic use. And subject thereto:

Class 5. Other purposes.

No coal embraced in Classes 1, 2, 3, or 4 shall be subject to reconsignment or diversion except for some purpose in the same class or a superior class in the order of priority herein prescribed.

8. That all rules, regulations, and practices of said common carriers by railroad with respect to car service as that term is defined in said act are hereby suspended so far as they conflict with the directions hereby made.

9. That this order shall be effective from and after July 26, 1922, and shall remain in force until the further order of the Commission.

10. That copies of this order be served upon the carriers hereinbefore described, and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 5:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

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